Case Nos. A154890 & A155334

In the Court of Appeal of the State of California
First Appellate District, Division Four

Six4Three, LLC,
Respondent and Cross-Appellant,

v.

Facebook, Inc. et al.,
Appellant and Cross-Respondents.

Appeal from San Mateo County Superior Court
Hon. V. Raymond Swope; Case No. CIV 533328

Cross-Appellant Six4Three's Opening Brief

Public – Redacts Material From Sealed Record

Allison L. Ehlert (SBN 230362)
Scotia J. Hicks (SBN 252647)
EHLERT HICKS LLP
2001 Addison St., Suite 300
Berkeley, CA 94704
Telephone: (510) 833-7339
Facsimile: (415) 692-8237
Email: aehlert@ehlerthicks.com
shicks@ehlerthicks.com
Counsel for Six4Three, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF APPEALABILITY

This appeal is from an order of the San Mateo County Superior Court, granting Cross-Respondents' special motion to strike under Code of Civil Procedure section 425.16. The order is appealable under Code of Civil Procedure section 425.16, subdivision (i).

INTRODUCTION

Six4Three was a small app developer who answered Facebook's enthusiastic call to build a business on Facebook Platform. For more than seven years, Facebook and its principals marketed Facebook Platform as a place where all apps—even those that directly competed with apps offered by Facebook—were welcome. They promised that opportunities and access to the social data necessary for building new apps would be provided to developers on a level playing field. But by the time Six4Three signed on to Facebook Platform in late 2012, Defendant Mark Zuckerberg and other Facebook principals had already decided to treat social data as a commodity that they would use to favor certain developers, eliminate others from the market altogether and, above all, enrich Facebook.

Even as Defendants continued to invite and train developers to use Facebook Platform, they began to implement a plan to do away with the level playing field they had promised. In 2015, under the guise of enhancing user privacy, Defendants announced that Facebook would cut off access to key application program interfaces (APIs). The APIs were the conduits to social data upon which many developers—including Six4Three—relied in order for their apps to function. But access to these APIs was not restricted for everyone. Instead, Defendants began internally "whitelisting" certain companies that did not compete with Facebook, and that agreed to purchase substantial advertising from Facebook or provide other significant financial consideration. In essence, Defendants sold user data. The whitelisted companies continued to have access to the key APIs even after 2015, while the majority of other companies,

including those that competed with Facebook or that did not purchase the advertising that Facebook expected, had their access cut off, for reasons unrelated to user privacy. Six4Three was one such casualty of Defendants' actions. It was forced to close shop, as its app could not function without access to the APIs that Defendants now provided only to select developers. At the time Defendants cut off access to these APIs, Six4Three was valued at over $4 million and had projected profits of $1.15 million from sales of its Pikinis app. It had plans to build a robust business around its photo management and sharing technology. But Defendants' actions immediately put Six4Three out of business. Later that year, Six4Three filed this lawsuit.

On May 3, 2018, the Individual Defendants filed an Anti-SLAPP motion to strike the Fifth Amended Complaint, claiming that Six4Three's lawsuit amounted to an unlawful attempt to stifle their constitutionally protected publishing decisions, and that they are immunized from liability by the federal Communications Decency Act (the "CDA").

The Individual Defendants' resort to the Anti-SLAPP statute is misplaced. This lawsuit is not about content that appears on the Facebook website, nor is it about Defendants' decisions with respect to what content to publish or prohibit on that website. Rather, Six4Three is suing over representations Defendants made to developers—specifically the representation that developers would receive access to Facebook's APIs on a level playing field—to induce those developers to invest time and money building apps on Facebook Platform. These representations constituted unprotected, commercial

speech about Facebook's operations, and are not immunized by the Anti-SLAPP statute or the CDA.

In its order, the trial court agreed with Six4Three on the merits. Yet the trial court ultimately granted the Anti-SLAPP motion on strictly procedural grounds. Facebook and the Individual Defendants brought separate Anti-SLAPP motions, which were briefed at different times, but which the trial court consolidated for hearing and decision. Six4Three filed its opposition to Facebook's motion first, because that motion was filed first. When Six4Three subsequently opposed the Individual Defendants' later-filed motion, it incorporated by reference certain arguments it had already made in opposition to Facebook's motion. The trial court took exception to this approach, even though Six4Three's purpose was merely to avoid the needless duplication of arguments it had already presented. The trial court held that Six4Three's incorporation by reference was improper in and of itself, and was further improper because it had resulted in an oversized brief. Citing Rule of Court 3.1113(g), the trial court held it had the discretion to disregard the substance of Six4Three's incorporated argument. As a practical matter, that meant the trial court treated Six4Three as though it had not opposed the Individual Defendants' Anti-SLAPP motion at all, and it therefore granted the motion. This was a classic abuse of discretion and, if allowed to stand, is highly prejudicial to Six4Three. The granting of an Anti-SLAPP motion is a case-ending event. Six4Three deserved a ruling on the merits—especially where the trial court apparently agreed with Six4Three's substantive arguments—rather than the trial court's draconian and ill-reasoned *procedural* ruling.

This Court should reject the trial court's decision and consider the merits of Six4Three's arguments. The Court should then hold that the speech at issue is unprotected, commercial speech and that, even if some protected speech is at issue, the Defendants are not immunized by the CDA and Six4Three is likely to prevail on the merits.

STATEMENT OF FACTS

A. Defendants Launch the Facebook Platform and Encourage Developers to Build Applications.

Six4Three was an image recognition and photo-analysis company founded in December 2012. (4 CAA 1231; 4 AA 1109.)[1] It developed a unique image-classification tool that could automatically sort photos based on certain criteria, such as the presence of logos, brands, individuals, or environments – all without the need for the user to review the individual photos. (*Ibid.*) One popular application of this classification tool was Pikinis. Pikinis was an app that used Six4Three's image-recognition technology to search through photos shared by Facebook users, to find summer photos that included friends at the beach or pool, on a boat, in bathing suits, and the like. (4 CAA 1237; 4 AA 1115.) Six4Three chose to feature summer photos in its first app, after its survey research showed overwhelming user interest in this subject matter. (*Ibid.*) Ultimately, however, Six4Three planned to develop a suite of apps with varied image subjects, all of

[1] Cross-Appellant Six4Three's Appendix is referred to herein as "CAA," and its Sealed Appendix as "SCAA." Appellant Facebook's Appendix and Sealed Appendix are referred to as "AA" and "SAA," respectively.

which would utilize Six4Three's one-of-a-kind photo-sorting technology. (*Ibid.*) Six4Three's technology operated within Facebook users' privacy settings, such that it could only access photos with user permission. (*Ibid.*)

Facebook operates a social networking website that enables users to connect and share information with other users. (4 CAA 1208; 4 AA 1086.) Defendants Mark Zuckerberg, Christopher Cox, Javier Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar (the "Individual Defendants") are all Facebook principals or executives that decided, directed, or implemented the conduct Six4Three describes in its Complaint. (4 CAA 1199-1207; 4 AA 1077-85.)

In 2007, Facebook launched its developer platform ("Facebook Platform"), which allowed developers to build applications or "apps" using data from Facebook's Social Graph. (4 CAA 1208-1210; 4 AA 1086-1088.) The Social Graph was a collection of social data compiled from user content and from content created by Facebook itself. Data from the Social Graph were accessible to developers through application program interfaces ("API" or the "Graph API"), which allowed Facebook users, through the Facebook Platform, to communicate and interact with each other in apps built by companies other than Facebook, just like Apple permits developers to build applications for its iPhones and Mac computers. A user could therefore choose between Facebook's app for a particular feature or service, if available, or an app built by another developer. Using APIs, developers could access distinct categories of Facebook content or capabilities, referred to as "endpoints," with explicit permission from Facebook users. (4 CAA 1222; 4 AA 1100.) For example, with a user's permission, Six4Three could access the "Photos" endpoint.

Similarly, if a user's friend shared photos with that user, Six4Three could also, with permission from the user and friend, access the "Friends' Photos Endpoint." (4 CAA 1222-1223; 4 AA 1100-1101.) Certain endpoints also made available data or capabilities created by Facebook, rather than users. The "User ID" and "Friends List" endpoints were two such categories of Facebook-created data, which Six4Three ultimately used in building its app. Data from these endpoints allowed Six4Three to build photo management applications that could compete with Facebook's own photos application.

Defendants' launch of Facebook Platform was accompanied by considerable fanfare and an aggressive initiative to recruit developers to build applications. (4 CAA 1208-1209; 4 AA 1086-1087.) Defendants purported to "welcome developers with competing applications, including developers whose applications might compete with Facebook-built applications" and promised that "third-party developers are on a level playing field with applications built by Facebook." (4 CAA 1213-1214; 4 AA 1091-1092.) Further, Defendants represented that they would ensure a stable privacy regime for Facebook Platform, and that users could always "choose to completely opt out of making their data available through Facebook Platform," (4 CAA 1302; 4 AA 1180.) Developers responded enthusiastically to Facebook's grand vision and invitation, and Facebook Platform quickly became one of the largest platform economies on the planet. (4 CAA 1215-1216, 1226-1227; 4 AA 1093-1094, 1104-1105.)

B. Six4Three Contracts with Facebook to Develop Pikinis on the Facebook Platform.

On December 11, 2012, Six4Three entered into Facebook's Statement of Rights and Responsibilities ("SRR"), the operative agreement in this case. (4 CAA 1232; 4 AA 1110; 4 SCAA 2686.) The primary consideration offered by Facebook under the SRR was to provide Six4Three with "all rights necessary to use the code, APIs, data, and tools you receive from us." (4 CAA 1232; 4 AA 1110; 4 SCAA 2691.) In exchange, Six4Three granted Facebook the right to analyze and audit Six4Three's data "for any purpose, including commercial." (*Ibid.*) Accordingly, Six4Three was required to share with Facebook its confidential and proprietary source code, including the intellectual property behind its photo-sorting technology, upon Facebook's request. (4 CAA 1234; 4 AA 1112.) Defendants also required Six4Three to enter into a license agreement, incorporating Facebook's terms of service, with each Pikinis user. (4 CAA 1254; 4 AA 1132.)

Six4Three obtained commitments in excess of $200,000 in seed capital to build its business on Facebook Platform. (4 CAA 1231; 4 AA 1109.) A trial period of the Pikinis app was successful, with more than 4,400 users downloading the app. (4 CAA 1253-1254; 4 AA 1131-1132.) The vast majority of those users also subscribed to paid, premium content, giving Six4Three its first monthly revenues. (*Ibid.*) In 2015, just before Six4Three was abruptly shut down, the company was valued at over $4 million. (5 CAA 1824.)

C. Defendants Shut Down Six4Three's Access to the API.

Unbeknownst to Six4Three, by December 2012 when it entered into the SRR with Facebook, Defendant Mark Zuckerberg had already made the decision to privatize access to over 50 APIs on which Six4Three relied. (4 CAA 1228-1230; 4 AA 1106-1118.) Other Facebook principals pushed to make an announcement about this change to developers, but Zuckerberg directed that no disclosure should be made. (*Ibid.*) Instead, Defendants continued to invite developers to build apps on the Facebook Platform, knowing that tens of thousands of apps that relied on these 50 key APIs would soon stop functioning. (4 CAA 1230-1231, 1241; 4 AA 1108-1109, 1119.)

Defendants restricted access to the Social Graph in order to leverage access to this data for advertising revenues. (4 CAA 1229; 4 AA 1107.) Accordingly, Defendants whitelisted certain developers for continued access to the Graph API, if those companies did not directly compete with Facebook, and if they provided financial or other consideration in exchange – a relationship Defendants referred to as "Reciprocity." (4 CAA 1228-1229; AA 1106-07.) In so doing, Defendants sold user data to other companies – something Facebook has long said it would never do. And, contrary to Defendants' promises that developers would have "deep integration" into Facebook's website, and that competing apps would be on a level playing field with each other and with Facebook, Defendants gave preferential treatment to some developers and deliberately eliminated others from the market. (4 CAA 1256-1257; 4 AA 1134-1135.)

On January 20, 2015, Facebook informed Six4Three that it would end developer access to key Social Graph APIs on April 30,

2015. (4 CAA 1253; 4 AA 1131.) Six4Three's technology would not function without access to these APIs. As a result, Six4Three could not fulfill its purchase and license agreements with Pikinis users, or invest in further development of its business, and it ceased business operations that very day. (*Ibid.*) On the other hand, "whitelisted" companies that entered into separate agreements with Facebook, in which they promised to purchase advertising, continued to have access to the Graph API. Companies that were not approached by Defendants to enter into such agreements, or that were expressly blacklisted by Defendants for being competitive with Facebook, were cut off from the APIs and effectively forced out of business. (4 CAA 1256-57; 4 AA 1134-35.) Less than three months after Defendants cut off Six4Three's access to the Graph API, Facebook launched two of its own photo sorting and sharing apps, both of which were directly competitive with Pikinis and the suite of apps Six4Three planned to build. (4 CAA 1256; 4 AA 1134.)

PROCEEDINGS BELOW

A. Six4Three Files its Lawsuit and Survives Facebook's Demurrers.

Six4Three filed its original complaint against Facebook on April 10, 2015, alleging various business tort and contract causes of action. (1 CAA 26; 1 AA 21.) At the heart of the complaint were Six4Three's allegations that Facebook had induced developers to create applications on the Facebook Platform by agreeing to provide Social Graph APIs on a level playing field, and that Facebook's decision to terminate access to those APIs for non-whitelisted companies caused

Six4Three's app to stop functioning, harming Six4Three. (1 CAA 31-32; 1 AA 26-27.)

Facebook filed, and Six4Three survived, a number of demurrers to Six4Three's complaint and subsequent amendments.[2] Six4Three's Fourth Amended Complaint stated causes of action for violation of California Business & Professions Code §§ 17200 *et seq*., breach of contract, concealment, intentional and negligent misrepresentation, intentional interference with contract, and intentional and negligent interference with prospective economic relations. (2 CAA 396; 1 AA 278.)

B. Facebook and the Individual Defendants File Anti-SLAPP Motions.

Almost three years after Six4Three filed this action, on November 21, 2017, Facebook filed a Special Motion to Strike Six4Three's Fourth Amended Complaint under California Code of Procedure Section 425.16. Given the extraordinary delay in Facebook's filing of its Anti-SLAPP motion, Six4Three opposed the motion as untimely, among other substantive grounds. (2 CAA 638, 2 AA 5018.) The California Supreme Court was, at that time, considering the question of the timeliness of Anti-SLAPP motions brought to strike amended complaints in *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637, 639-640. The trial court held a hearing on Facebook's Anti-SLAPP motion on January 9, 2018, but

[2] Facebook also removed the action to federal court in January 2017, alleging federal question jurisdiction. (Doc. 1, No. 3:17-cv-00359 (N.D. Cal. Jan. 24, 2017).) Finding no federal question to be at issue, the district court remanded. (Doc. 35, No. 3:17-cv-00359 (N.D. Cal. Feb. 14, 2017).)

decided to defer its decision until *Newport Harbor* was decided. (Jan. 9, 2018 Tr. 73-74.) After that same hearing, the trial court also requested supplemental briefing from both parties on the issues of commercial speech and Facebook's asserted defense under the Communications Decency Act (CDA). (4 CAA 1307, 4 AA 1185.)

Six4Three had earlier sought to amend its Second Amended Complaint to add the Individual Defendants – all Facebook principals who Six4Three alleges directly participated in Facebook's wrongful conduct. The trial court initially denied that request. (1 CAA 288.) Six4Three sought writ relief from this Court and, while Facebook's Anti-SLAPP Motion was pending, this Court ordered the trial court to permit Six4Three's amendment. (2 CAA 627.) As Six4Three had by then already filed a Fourth Amended Complaint, the trial court issued an order permitting Six4Three to file a Fifth Amended Complaint, adding the Individual Defendants. Six4Three filed its Fifth Amended Complaint on January 12, 2018. (4 CAA 1191, 4 AA 1069.) The Individual Defendants then filed a Special Motion to Strike the Fifth Amended Complaint on May 3, 2018. (4 CAA 1503.)

On January 26, 2018, the Individual Defendants filed a peremptory challenge to the trial court judge, and the case was transferred to the Hon. V. Raymond Swope. The California Supreme Court decided *Newport Harbor* on March 22, 2018 and, following a case management conference on April 27, 2018, Judge Swope ordered the parties to prepare supplemental briefing on the effect of that case on Facebook's Anti-SLAPP motion. The court also set a briefing schedule for the Individual Defendants' Anti-SLAPP Motion, and ordered that both Anti-SLAPP motions would be heard and decided together. (8 CAA 4863.)

C. Judge Swope Denies Facebook's Motion as Untimely, and Grants the Individual Defendants' Motion Solely on Procedural Grounds.

In its oppositions to the two Anti-SLAPP motions, Six4Three made identical substantive arguments. In the interest of judicial economy and efficiency, Six4Three incorporated by reference material from its opposition to Facebook's Anti-SLAPP motion in its opposition to the Individual Defendants' motion. (7 CAA 4840.) At the hearing for both motions on July 2, 2018, the trial court appeared to admonish Six4Three for incorporating material from its parallel briefing, citing procedural concerns under California Rules of Court 3.113(d) and (e), which govern the page length of motion memoranda. (Jul. 2, 2018 Tr. 54-57.) Following Six4Three's explanation that it was merely attempting to provide efficient briefing, the trial court proceeded with the hearing on the merits. The court specifically heard argument from Six4Three on two key issues it had incorporated by reference: Six4Three's arguments that the speech at issue was commercial speech (*Id.* at 53-54, 57-58, 70-71.) and that Defendants' conduct was not immunized by the CDA. (*Id.* at 58-59, 60, 62-64, 73-75, 78-80.)

Following the hearing, the trial court denied Facebook's motion as untimely, relying on *Newport Harbor*.[3] (8 CAA 5352; 5 AA 1543.) With regard to the Individual Defendants' motion, the trial court conducted a favorable analysis of Six4Three's opposition on the merits, but granted the Anti-SLAPP motion on procedural grounds, namely, that Six4Three had improperly incorporated argument from its opposition to the Facebook Anti-SLAPP motion in its opposition to

[3] That determination is the subject of Appeal No. A154890, consolidated with this appeal.

the Individual Defendants' Anti-SLAPP motion, and that this incorporation by reference increased the length of Six4Three's brief beyond the page limit permitted under Rule of Court 3.1113(d). (8 CAA 5360-5361; 5 AA 1551-1552.) The trial court reasoned that because Six4Three had not sought permission to file an oversized brief under Rule of Court 3.1113(e), it had discretion to treat Six4Three's opposition as late-filed, and disregard the incorporated content. (8 CAA 5361-5362; 5 AA 1552-1553.) The trial court explained that its decision "may have ended in a different result" had Six4Three complied with the trial court's view of proper procedure. (8 CAA 5366; 5 AA 1557.) Six4Three moved the trial court to set aside its judgment (8 CAA 5372; 5 AA 1563), which the court denied – again, solely on procedural grounds. (8 CAA 5404; 5 AA 1593.)

On July 23, 2018, Facebook filed a notice of appeal from the trial court's order, which was docketed under Case No. A154890. On September 10, 2018, Six4Three filed a cross-appeal, challenging the trial court's grant of the Individual Defendants' Anti-SLAPP Motion. That appeal was docketed under Case No. A155334. Because Facebook's appeal and Six4Three's cross-appeal were taken from the same trial court order and both involve challenges to the trial court's Anti-SLAPP analysis, the parties jointly moved this Court for an order consolidating the appeals. The Court granted the motion on October 12, 2018.

ARGUMENT

A. The Superior Court Misinterpreted Procedural Rules Governing Memoranda and Abused Its Discretion by Refusing to Consider Six4Three's Arguments on the Merits.

This Court reviews a trial court's interpretation of the Rules of Court *de novo*. (*Sino Century Dev. Ltd. v. Farley* (2012) 211 Cal.App.4th 688, 693.) Where, as here, a trial court misunderstands the law or the scope of its discretion, this Court reviews its actions for an abuse of discretion. (*Gabriel P. v. Suedi D.* (2006) 141 Cal.App.4th 850, 862.)

The trial court's grant of the Individual Defendants' Anti-SLAPP motion was based entirely on procedural grounds. According to the trial court: (1) Six4Three improperly incorporated by reference arguments that it made in its opposition to Facebook's motion, in its opposition to the Individual Defendants' motion; and (2) this incorporation by reference resulted in an oversized brief, which Six4Three did not obtain permission to file. Based on these findings, the trial court held it had discretion to disregard the incorporated arguments—despite having entertained these arguments at the hearing, and explicitly recognizing in its Order that Six4Three's arguments were meritorious. (Jul. 2, 2018 Tr. 53-54, 57-60, 70-71, 73; 8 CAA 5366; 5 AA 1557.)

1. Six4Three Properly Raised its Arguments on Commercial Speech and the CDA Before the Trial Court.

In opposition to Facebook's Anti-SLAPP motion, Six4Three argued that the speech at issue was unprotected, commercial speech (2 CAA 640-643; 2 AA 520-523), and that Facebook was not

immunized by the CDA, as Six4Three sought to hold it liable for its own speech, rather than the speech of third parties. (2 CAA 644-645; 2 AA 524-525.) Six4Three repeated these arguments in its Supplemental Memorandum of Points and Authorities in Opposition to Defendant's Motion to Strike (Anti-SLAPP Prong One) (4 CAA 1315-1323), its Reply to Defendant's Supplemental Memorandum in Support of its Motion to Strike (Anti-SLAPP Prong One) (4 CAA 1428-34), and at the July 2, 2018 combined hearing on both Facebook's and the Individual Defendants' Anti-SLAPP motions. (Jul. 2, 2018 Tr. 53-54, 57-60, 70-71, 73.) Indeed, Six4Three made these arguments before the trial court, in one form or another, *four times*.

When the trial court set the briefing schedule for the Individual Defendants' Anti-SLAPP motion and ordered both Anti-SLAPP motions to be heard together, Six4Three incorporated these arguments by reference in its opposition, as they applied with equal force to the Individual Defendants. (7 CAA 4840.) At the hearing, although the court questioned Six4Three's trial counsel as to whether it was proper for Six4Three to have incorporated these arguments by reference, the court ultimately permitted Six4Three to present its commercial speech and CDA arguments, and Defendants were given the opportunity to respond. (Jul. 2, 2018 Tr. 54-57, 58-60, 62-64, 73-75, 78-80.)

2. Six4Three's Incorporation by Reference Was Proper.

In its July 16, 2018 Order, the trial court held that Six4Three's incorporation by reference of its commercial speech and CDA arguments was improper under Code of Procedure sections 420

(defining pleadings) and 425.16, subdivision (b)(2), which instructs that the Court "shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (8 CAA 5360-5361; 5 AA 1551-1552.) However, nothing in either statute addresses the issue of incorporation by reference or precludes a court from considering arguments raised in parallel briefing, particularly where, as here, the arguments were well known to the court and discussed at length during the hearing.

Six4Three's incorporation of its prior briefing by reference was proper under California Rule of Court 3.1110(d), which provides that "[a]ny paper previously filed must be referred to by date of execution and title." Six4Three specifically identified the motion papers it sought to incorporate, consistent with this Rule. (7 CAA 4840.) The trial court held that subdivision (d) pertains only to evidence incorporated by reference, and not argument, citing *Roth v. Plikaytis* (2017) 15 Cal.App.5th 283, 291. (8 CAA 5361; 5 AA 1552.) But Rule 3.1110(d) pertains generally to "papers," which are not limited to evidence. (Cal. Rules of Court, rule 2.3(2) ["'Papers' includes *all documents*, except exhibits and copies of exhibits, that are offered for filing in any case."] [emphasis added].) *Roth* is consistent with this definition, holding that a litigant may "incorporate previously filed *documents*" (*Roth, supra*, at p. 291 [emphasis added]), and that it was an abuse of discretion for the trial court to fail to consider them. Although the specific dispute in *Roth* included evidence that was incorporated by reference, its holding also encompassed "other documents." (*Id.* at 288, 292.) (*See also Larsen v. Johannes* (1970) 7 Cal.App.3d 491, 496 ["The notice of motion indicated reliance upon *all the files* in this action, *and the pleadings* incorporating the

documentation. This was sufficient to bring them before the court." [emphasis added].) Accordingly, Six4Three's incorporation of its motion papers was proper under the rules, and sufficient to bring the arguments therein before the trial court.

3. Six4Three Did Not File an Oversized Brief.

The trial court next held that Six4Three's incorporation of its prior motion papers violated the 15-page briefing limit under Rule 3.1113(d), and that the court therefore had discretion to disregard arguments made therein. (8 CAA 5361; 5 AA 1552.) No rule or case law provides that material incorporated by reference should count toward the page limit for a litigant's memorandum. The court's decision to exclude Six4Three's commercial speech and CDA arguments on this basis was without legal authority, and was an abuse of discretion. (*Gabriel P., supra*, at p. 862. ["There is an abuse of discretion when the trial court's action 'transgresses the confines of the applicable principles of law.'"].) Moreover, even if Six4Three's memorandum could be construed as exceeding the page limits, the Rules governing the length of memoranda are flexible, allowing litigants to request permission to exceed the page limits of Rule 3.1113(d). (*See* Cal. Rules of Court, rule 3.1113(e).) Six4Three had no reason to believe it needed to request permission to file a longer brief under Rule 3.1113(e), but had it made such a request, there is every indication the trial court would have granted it. The court suggested as much at the hearing, specifically noting that "relief, as I said in the Rules of Court, Subdivision (e), is available to have a more expansive brief." (Jul. 2, 2018 Tr. 57.) Rule 3.1113(d) cannot properly serve as a basis for the trial court's order.

4. The Trial Court Violated This Court's Strong Policy Favoring Disposition of Cases on Their Merits.

The trial court issued a case-ending order for Six4Three, on wobbly and draconian procedural grounds. In order to reach the conclusion that Six4Three "does not argue in opposition that any of the claims against Defendants are unprotected activity" (8 CAA 5359; 5 AA 1550) and that Six4Three "failed to raise any argument or cite to any legal authority or evidence to demonstrate the CDA does not apply," (8 CAA 5364; 5 AA 1555) the trial court had to ignore the three pleadings in which Six4Three directly raised these arguments, and act as if it had not fully vetted the substance of these arguments at the hearing. This was an abuse of discretion. "It is the policy of our law to favor, whenever possible, a hearing on the merits . . . ." (*Weitz v. Yankosky* (1966) 63 Cal.2d 849, 854.) Courts must "employ a flexible rather than rigid or formalistic approach to decisionmaking," as "[r]igid rule following is not always consistent with a court's function to see that justice is done." (*Kapitanski v. Von's Grocery Co.* (1983) 145 Cal.App.3d 29, 32.)

Here, the trial court clearly recognized the merits of Six4Three's arguments. It engaged with Six4Three on the substance of its arguments at the hearing, heard Defendants' counterarguments, and saw fit to weigh in on the persuasiveness of Six4Three's claims in its Order. Indeed, the court devoted a full section of its order to its analysis of Six4Three's commercial speech and CDA arguments, noting that the "motion may have ended in a different result" had Six4Three's briefing conformed to the court's view of proper procedure. (8 CAA 5366; 5 AA 1557.) Procedural rules exist to ensure

that "the court and parties will be familiar with the facts and the issues so that meaningful argument can take place and an informed decision rendered at the earliest convenient time." (*Kapitanski*, *supra*, at p. 33.) They should not be used as a basis for avoiding a disposition on the merits, particularly where, as here, the court's order has prejudiced Six4Three so greatly. This Court should hold that Six4Three's arguments concerning commercial speech and the CDA were properly before the trial court, and were not waived.

B. Legal Standard on Review of Anti-SLAPP Decisions.

An appellate court reviews an order granting an Anti-SLAPP motion *de novo*. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.) The court analyzes the motion in two steps. First, the court decides whether the defendant has met its burden to show that the challenged cause of action is one 'arising from' protected activity. (Code Civ. Proc. § 425.16, subd. (b)(1).) If, and only if, the court finds the defendant has made such a showing must it consider whether the plaintiff has demonstrated a probability of prevailing on the claim. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.)

The plaintiff's burden on the second prong of this analysis is low: Only a cause of action that lacks "minimal merit" is subject to being stricken under the Anti-SLAPP statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) If the plaintiff "can show a probability of prevailing on *any part of its claim*, the cause of action is not meritless" and will not be stricken; "once a plaintiff shows a probability of prevailing on any part of its claim, the plaintiff has established that its cause of action has some merit and the entire

cause of action stands." (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 106 [emphasis in original].)

C. Six4Three's Causes of Action Do Not Arise from Protected Activity.

California's Anti-SLAPP statute empowers courts to strike lawsuits that are "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc. § 425.16, subd. (a).) Section 425.16 applies to conduct that furthers the exercise of free speech in connection with an issue of public interest. (*Id.*, subd. (e)(4).) On a motion to strike under section 425.16, it is the defendant's burden to demonstrate that the speech at issue arises from such protected activity. In evaluating the motion, courts "look for the principal thrust or gravamen of the plaintiff's cause of action." (*Hecimovich v. Encinal School Parent Teacher Org.* (2012) 203 Cal.App.4th 450, 465. [internal quotations and citations omitted].) The "critical consideration is what the cause of action is based on." (*Ibid.*)

Defendants made false and misleading representations about their management of Facebook Platform and its status as a level playing field, in order to encourage developers to create apps that would generate user engagement and revenue streams for Defendants. Thus, at the most fundamental level, this dispute is not about statements the Defendants made in furtherance of their free speech rights. It is about representations they made to software developers about the terms under which they would make APIs available to those developers on Facebook Platform. The speech at issue is not

protected speech; it is commercial speech exempted from the protections of the Anti-SLAPP statute.

1. The Speech at Issue is Commercial Speech, Exempted from Protection Under Code of Civil Procedure § 425.17

The Legislature enacted section 425.17 in response to a "disturbing abuse" of the Anti-SLAPP statute, in which defendants attempted to reframe commercial disputes as First Amendment issues and use Anti-SLAPP motions as a "litigation weapon to slow down and perhaps even get out of litigation." (*See* Code Civ. Proc. § 425.17, subd. (a); Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 515 [2003–2004 Reg. Sess.] as amended July 8, 2003, p. 7; Sen. Com. On Judiciary, Analysis of Sen. Bill No. 515 [2003–2004 Reg. Sess.] as amended May 1, 2003, p. 5.) Accordingly, section 425.17 provides that Anti-SLAPP protection is unavailable for commercial speech. (Code Civ. Proc. § 425.17.)

Subdivision (c) provides, in relevant part, that the Anti-SLAPP statute does not apply to "any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services" if:

> (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services[; and]

> (2) the intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer . . . .

Under the two-prong analysis that courts conduct in evaluating an Anti-SLAPP motion, the question of whether the speech at issue falls under the commercial speech exception is analyzed under prong one. (*Demetriades v. Yelp, Inc.* (2014) 228 Cal.App.4th 294, 308.)

In *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, the California Supreme Court distilled the requirements of section 425.17(c) into a four-part test. Accordingly, speech is exempted from protection under the statute if: (1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services; (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services; (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and (4) the intended audience for the statement or conduct meets the definition set forth in section 425.17(c)(2). (*Id.* at p. 30.). Six4Three prevails on each element of the *Gore* test.

a) Defendants are primarily engaged in the business of selling or leasing goods or services.

Under this Court's analysis in *Demetriades*, Facebook is "primarily engaged in the business of selling or leasing goods or services," bringing it within the scope of section 425.17(c). In *Demetriades*, a restaurant owner sued Yelp, the operator of a popular website that contains customer reviews of businesses. (*Demetriades v. Yelp, supra*, at p. 298.) The plaintiff alleged that Yelp had made false claims about the accuracy and efficacy of its "filter" for unreliable or biased customer reviews. (*Ibid.*) In determining that Yelp was "primarily engaged in the business of selling or leasing goods or services," the court found that Yelp's revenue stream indicated it was primarily in the business of providing advertising to businesses. (*Id.* at p. 312.) Yelp had argued that "although Yelp sells advertising, it is primarily engaged in providing a free public forum for members to read and write reviews about local business, services, and other entities." (*Id.* at p. 305.) But the Court disagreed with Yelp's characterization of its business, holding instead that the user reviews were a "device whereby prospective users and reviewers are attracted to Yelp's Web site. Thus, Yelp's statements about the accuracy and performance of its review filter are designed to attract users and ultimately purchasers of advertising on its site." (*Id.* at p. 312.)

Demetriades is on all fours with this case. Like Yelp, Facebook is primarily in the business of selling advertising.[4] It is part of a

[4] Indeed, during Mark Zuckerberg's testimony before the United States Senate, Senator Orrin Hatch specifically asked how Facebook sustains "a business model in which users don't pay for your

duopoly that captures 99% of the growth in the digital advertising industry. (4 CAA 1439; 4 AA 1074; 2 SCAA 1010-1013.) A recent study showed that Facebook's share of that growth translates to approximately $8 billion per year. (*Ibid.*) As detailed in Six4Three's complaint, Defendants lured in a large number of developers by providing access to the Graph API at no cost, but cut off this access to companies unless they agreed to make minimum annual purchases in Facebook's new mobile advertising product or provided other financial consideration, and only if they did not compete with Facebook.[5] (4 CAA 1228-1229; 4 AA 1106-1107.) Particularly with regard to Facebook Platform, Defendants did not simply offer a free public forum for social exchange. Rather, Defendants offered Facebook Platform as a way to propel users and revenues to Facebook. (4 CAA 1220-1221; 4 AA 1098-1099.) Just like Yelp in the *Demetriades* case, although Facebook offers a free social media service to its website users, Facebook's business is sustained through advertising sales. (4 CAA 1439; 4 AA 1074; 2 SCAA 1010-1013.) Ultimately, Facebook's free service is designed to attract users and

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service?" Zuckerberg famously quipped, "Senator, we run ads." (*Transcript of Mark Zuckerberg's Senate Hearing*, Wash. Post (Apr. 10, 2018) https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing/ [as of Feb. 25, 2019].)

[5] Six4Three purchased advertising from Facebook in order to promote and test Pikinis but was not approached by Facebook to enter into "whitelisted" purchase agreements, presumably because it was a small business, and Defendants had determined that photo apps were too competitive to be whitelisted. (4 CAA 1230, 1239-1240, 1256; 4 AA 1108, 1117-1118, 1134.)

prospective purchasers of advertisements—software developers like Six4Three and other businesses.

(1) *Cross* is Inapposite

In its briefing before the trial court, Defendants argued that Facebook is not primarily engaged in the business of selling goods or services, based on the Court of Appeal's ruling in *Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 203. However, as the trial court pointed out at hearing, *Cross* "is not similar to this" case. (Jan. 9, 2018 Tr. 70.) In *Cross*, a musician (Knight) sued Facebook when it refused to disable a user-created page that Knight claimed to have incited violence and death threats against him. (*Cross*, *supra*, 14 Cal.App.5th at p. 194.) In holding that the commercial speech exemption under section 425.17 did not apply, the Court of Appeal determined that "while Facebook sells advertising, it is not 'primarily engaged in the business of selling or leasing goods or services.' Knight has not alleged that it is. Nor could he, as Facebook offers a free service to its users." (*Id.* at p. 203.)

Defendants take these lines to be a judicial proclamation of the nature of Facebook's business in all contexts, and for all time. They are not.[6] *Cross* was a case brought by a Facebook user, attempting to hold Facebook liable for the conduct of other users. It is in that context that the Court of Appeal made its statement that Facebook was not "primarily engaged in the business of selling or leasing goods or services." (*See ibid.*). And it is for that reason that the Court opined

[6] And, in any event, this Court is not bound by the *Cross* court's characterization of the nature of Facebook's business. (*Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409.)

that Knight could not allege otherwise—because he was a Facebook user, and the "free service" offered to him did not involve the selling or leasing of goods and services. (*See ibid.* [("Facebook offers a free service *to its users*."] [emphasis added].)

Unlike the plaintiff in *Cross*, Six4Three brings its lawsuit as a defrauded software developer and party to a breached contract, not as a Facebook user. (4 CAA 1231-1232; 4 AA 1109-1110.) Its claims arise from Defendants' treatment of data as a commodity, and the false representations Defendants made about fair and equal access to that commodity, in order to further their business interests. (4 CAA 1193-1194; 4 AA 1071-1072.) In that context, and in light of Facebook's revenue stream, there can be little doubt that Facebook is primarily engaged in the business of selling advertising. This is not a case where statements made by users are at issue, or where Defendants' statements were made to users in their roles as providers of Facebook to those users. Thus, *Cross* is inapposite and, as the trial court observed in its order on Defendants' Anti-SLAPP motion, this case more closely resembles *Demetriades.* (*See* 8 CAA 5365; 5 AA 1556.)

b) Defendants' statements about the availability of the Graph API are representations of fact about their business operations and services, made for the purpose of promoting or securing sales of advertising and other commercial transactions.

Six4Three is suing Defendants over false or misleading representations of fact they made about services Facebook purported

to provide to developers – representations that Six4Three relied on to its detriment. Specifically, these representations include:

- "Facebook Platform offers deep integration in the Facebook website, distribution through the social graph and an opportunity to build a business." (4 CAA 1212; 4 AA 1090.)
- "…applications from third-party developers are on a level playing field with applications built by Facebook. (*Ibid.*)
- "…third-party developers can now create applications on the Facebook site with the same level of integration as applications built by internal Facebook developers." (*Ibid.*)
- "You can now build applications that have the same access to integration into the social graph as Facebook applications…" (4 CAA 1210; 4 AA 1088.)
- "Third-party applications won't be treated like second-class citizens." (4 CAA 1211; 4 AA 1089.)
- "With this evolution of Facebook Platform, we've made it so that any developer can build the same applications that we can. And by that, we mean that they can integrate their application into Facebook—into the social graph—the same way that our applications like Photos and Notes are integrated." (4 CAA 1219; 4 AA 1097.)
- "Developers also benefit from the Facebook Platform as it gives them the potential to broadly distribute their applications and even build new business opportunities." (4 CAA 1213; 4 AA 1090.)
- "You can gain distribution for your applications through the social graph like never before. Applications can be virally engineered to reach millions of Facebook users quickly and efficiently through the profile, news, feed, and mini-feed…." (4 CAA 1210; 4 AA 1088.)
- "You are free to monetize your canvas pages through advertising or other transactions you control." (*Ibid.*)
- "…we're giving developers the freedom to monetize their applications as they like." (*Ibid.*)

The main points communicated by these representations to software developers like Six4Three were that: (1) developers would have "deep integration" and access to social data in order to build their

applications on the Facebook Platform; (2) that such integration and access would be provided on a level playing field among developers and Facebook itself; and (3) that Facebook was committed to providing a platform for developers to build applications and monetize their businesses. (4 CAA 1209-1211; 4 AA 1087-1089.)

The above-described representations are similar in kind to the representations at issue in *Demetriades*. There, Yelp made statements about the accuracy of its review filter, including:

- All reviews go through a "remarkable filtering process that takes the reviews that are the most trustworthy and from the most established sources and displays them on the business page."
- The filter "keeps the less trustworthy reviews out so that when it comes time to make a decision you can make that [decision] using information and insights that are actually helpful."
- "Rest assured that our engineers are working to make sure that whatever is up there is the most unbiased and accurate information you will be able to find about local businesses."
- "Yelp has an automated filter that suppresses a small portion of reviews—it targets those suspicious ones you see on other sites."

(*Demetriades, supra*, 228 Cal.App.4th at p. 301.) The Court held that Yelp's statements were "representations of fact about its services." (*Id.* at p. 311.) Key to its holding was the Court's determination that these were "specific, detailed statements intended to induce reliance" on the Yelp filter. (*Ibid.*). The same is true of Defendants' statements here. Like Yelp, Defendants developed proprietary software and made representations of fact to developers about the nature and availability of that software. (*See id.* at pp. 300, 311; 4 CAA 1208-10; 4 AA 1086-88.) Those representations were designed to induce developers to build their applications on Facebook Platform, which generated new

users and advertising revenues for Facebook. (4 CAA 1193-1194; 4 AA 1071-1072.) The statements above are themselves an invitation to developers to build their businesses on Facebook Platform, and other statements made by Defendants further demonstrate this intent. For example, Defendant Mark Zuckerberg specifically stated that his goal in releasing the software APIs was "to entice an even larger group of people to become entrepreneurs and build a compelling business on Facebook Platform." (4 CAA 1220; 4 AA 1098.) Therefore, it is clear that Facebook's statements meet both the second and third elements of the *Gore* test (the cause of action arises from representations about business operations or services, and the statement was made for the purpose of promoting or securing sales of advertising or other commercial transactions). (*Gore, supra*, at p. 30.)

c) Defendants' intended audience was potential and actual customers.

Under the fourth and final element of the *Gore* test, speech is exempt from Anti-SLAPP protection if the intended audience is an actual or potential customer. (*Gore, supra*, at p. 30.) Here, Defendants' statements about Facebook Platform were made to developers who were considering entering into contracts with Facebook to build their apps on Facebook Platform. (4 CAA 1301; 4 AA 1179 ["Facebook Platform is a development system that enables companies and developers to build applications for the Facebook website . . . ."].) Indeed, Defendants' assurances about access to the Graph API were directed toward those whom such data would be useful—businesses and software developers. While, in general, Defendants' audience also includes users of the Facebook website,

Defendants made clear that this audience of "24 million active users" was a selling point to businesses seeking to build on Facebook Platform, noting that "[d]evelopers benefit from Facebook Platform as it gives them the potential to broadly distribute their applications . . . ." (*Ibid.*). Thus, just as in *Demetriades*, where the court found that Yelp's statements about the accuracy of its review filter were designed to attract businesses who would purchase advertising, Defendants' statements here were designed to attract developers who would build their apps on the Facebook Platform and purchase advertising to promote their businesses. In fact, Six4Three did just that. In reliance on Defendants' statements about the nature and availability of the Graph API, Six4Three built its photo analysis technology on Facebook Platform and purchased advertising to promote its Pikinis application. (4 CAA 1239-1240; 4 AA 1117-1118.)

d) Facebook's user content is not the speech at issue.

In arguing that the speech at issue is protected, Defendants conflate the statements they made to developers with the user content they collected from the Facebook website. They characterize this lawsuit as attempting to control what user content Defendants may publish or de-publish under a "traditional publisher function." (4 CAA 1519-20.) But Six4Three is not suing over user content. Indeed, the user content was simply a commodity that Defendants used to entice developers, so that they would build apps on Facebook Platform. The false and misleading representations Defendants made concern the non-discriminatory nature of the *access* they would provide to that commodity, namely that they would provide access to the Graph API, and that they would do so on an equal basis across

developers, including Facebook itself. As in *Demetriades*, these are statements about Defendants' own operations, and they are distinct from the underlying user content—just as Yelp's statements about the accuracy of its review filter were commercial speech, distinct from the underlying content of the user reviews. (*Demetriades, supra*, at p. 310.)

Defendants have not and cannot meet their burden on prong one of the Anti-SLAPP analysis, because the speech at issue is unprotected, commercial speech under Code of Procedure section 425.17. On that basis alone, this Court should reverse the trial court's order and direct that the Individual Defendants' motion be denied.

D. Six4Three Demonstrates a Probability of Prevailing on the Merits.

Even if the Court finds that Six4Three's complaint covers some protected speech, the Anti-SLAPP motion should still be denied because Six4Three can show a probability of prevailing on the merits.

1. The CDA does not apply to any cause of action.

Before the trial court, Defendants argued that their conduct is immunized by section 230 of the Communications Decency Act. (47 U.S.C. § 230, *et seq*.). But the CDA does not apply, as Six4Three seeks to hold Defendants liable for their own statements, not those of third parties.

In relevant part, section 230 of the CDA provides, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." (47 U.S.C. § 230(c)(1).) As the

language indicates, this provision acts to bar lawsuits that seek to hold companies like Facebook accountable for *user content*. As with its arguments on commercial speech, Defendants conflate the representations they made about access to user content with the user content itself. (4 CAA 1519.)

Each case Defendants cited to the trial court in support of their CDA argument concerns user content published or removed from the public website at issue. For example, *Sikhs for Justice*, upon which Defendants rely heavily, was a case about Facebook's decision to block access to the plaintiff's Facebook page for Facebook users in India. (*Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.* (2015) 144 F.Supp.3d 1088, 1089-1090.) Likewise, *Klayman v. Zuckerberg* involved allegations that Facebook refused to remove a page that contained hate speech against Jews. (*Klayman v. Zuckerberg* (2014) 753 F.3d 1354, 1355.) And *Cross* was about "refusing to disable the unauthorized Facebook pages" that the plaintiff alleged were inciting violence and death threats against him. (*Cross*, *supra*, at p. 200.) In each case, the plaintiffs sought to hold Facebook or its principals liable because they refused to remove content posted by third parties, or (in the case of *Sikhs for Justice*) because Facebook did remove content posted by the plaintiff user. And the publishing or de-publishing of the content at issue was to the Facebook website, *i.e.*, the forum that Facebook provides for users to post and view content. This is the type of "publishing" to which the CDA applies. (*See Fair Hous. Council v. Roommates.com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1162-1163 [["A] website may be immune from liability for some of the content *it displays to the public* . . . ."] [emphasis added].)

In this case, the gravamen of Six4Three's complaint relates to misrepresentations Facebook made to Six4Three and other developers regarding fair and equal access to its APIs. This case is not about Facebook's decisions to publish or de-publish user content. Indeed, the decision to remove access to an API does not affect whether any content remains published. The data at issue is still published to users on the Facebook website and is available to select developers and businesses to whom Facebook provides preferential access. (4 CAA 1257; 4 AA 1135.) Some APIs, such as the User ID and Friends List APIs, are not even user-created; the data are entirely created by Facebook. But, contrary to Facebook's promises, none of this data is equally available to Six4Three or to similarly situated developers. In each cause of action in the Complaint, Six4Three seeks to hold Facebook liable for agreeing to provide that data on an equal playing field to all developers, including Facebook itself, while knowingly and intentionally undermining that promise.

Moreover, Six4Three never had any desire to control Facebook's editorial decisions over content posted to users' Facebook pages, and it certainly understood that Defendants would remove offensive content from user pages in the ordinary course of business. In order to respect that process, Six4Three spent significant time and labor to develop built-in technology in its app that would remove such content whenever Facebook removed it from the website. Thus, anytime Facebook later de-published a piece of data, such as a photo, that it had previously sent to Six4Three through its APIs, Six4Three's technology would automatically de-publish that photo as well. (4 CAA 1234; 4 AA 1112.). Thus, to the extent Defendants suggest their decision to cut off developers' access to the Graph API was in the

service of protecting user privacy, that is an *ad hoc* argument unsupported by the record. Given that developers like Six4Three operated within Facebook's existing privacy controls, the best way to increase user privacy would have been for Defendants to provide the data to developers with more stringent privacy controls in the first instance—something Defendants failed to do.

This is simply not the type of case to which the CDA is intended to apply. The CDA was enacted in order to provide "good Samaritan" protection to interactive computer services, to allow them to edit and remove user-generated content without becoming liable for the defamatory or otherwise unlawful content that they failed to edit or delete. (47 U.S.C. § 230, *et seq.*; *Roommates.com*, *supra*, at p. 1163.) The three-part test for determining whether CDA immunity applies must be interpreted consistent with this purpose. (*Roommates.com, supra*, at p. 1164 ["[T]he substance of section 230(c) can and should be interpreted consistent with its caption," *i.e.*, "Protection for 'good samaritan' blocking and screening of offensive material."].) In that context, this case is closest to *Demetriades*, which held that the CDA simply did not apply where, as here, a plaintiff seeks to hold a defendant liable for its own statements regarding its operations, rather than the statements of third parties.

2. Six4Three's Claims are Meritorious.

Anti-SLAPP motions are intended to test cases at the pleading stage of litigation. Accordingly, the burden on the plaintiff to show a likelihood of prevailing on an Anti-SLAPP motion is one of "minimal merit." (*Navellier, supra*, at p. 89.) Here, Six4Three need only show a probability of prevailing on *any part* of each claim, in order to

establish this minimal merit. (*Mann, supra*, at p. 106 [emphasis added].) In evaluating the evidence presented, appellate courts "do not weigh credibility, nor [] evaluate the weight of the evidence." (*Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 989.) Rather, courts "accept as true all evidence favorable to the plaintiff and assess the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law." (*Ibid.*) Under this standard, Six4Three's claims have sufficient merit to warrant this Court's reversal of the trial court's order.

a) Six4Three Can Prevail on its Fraud and Tort Claims.

Six4Three presented sufficient evidence to the trial court to show a likelihood of prevailing on its causes of action for intentional and negligent misrepresentation. (*Lazar v. Sup. Ct.* (1996) 12 Cal.4th 631, 638.) This included evidence of misrepresentations made in the FAQ Facebook released to developers upon launching Facebook Platform, and other documents:

- "…applications from third-party developers are on a level playing field with applications built by Facebook." (4 CAA 1214, 1301; 4 AA 1092, 1179.)
- "…third-party developers can now create applications on the Facebook site with the same level of integration as applications built by internal Facebook developers." (*Ibid.*)
- "You can now build applications that have the same access to integration into the social graph as Facebook applications…" (4 CAA 1210; 4 AA 1088.)
- "Third-party applications won't be treated like second-class citizens." (4 CAA 1211; 4 AA 1089.)
- "Users are always in control of their information and can choose how much of their information is made available to specific applications." (4 CAA 1302; 4 AA 1180.)

- [redacted] (3 SCAA 1553.)[7]
- [redacted] (*Ibid.*)
- [redacted] (3 SCAA 1556.)

Six4Three also presented deposition testimony showing that [redacted] (3 SCAA 1307-1308; 1309-1312.) Defendants intended that Six4Three and other developers would rely on these statements and build applications on the Facebook Platform, [redacted] (3 SCAA 1169-1170.) Six4Three reasonably relied on these representations in deciding to build its photo analysis technology on the Facebook Platform. It certainly was not alone – it provided evidence that [redacted] (3 SCAA 1296-1297.) [redacted] (3 SCAA 1199-1204.) [redacted] (*Ibid.*) [redacted] (3 SCAA 1220-1221; 1854.) But not until January 20, 2015 did Defendants inform Six4Three that its technology would no longer

[7] Redacted text discloses material subject to the trial court's sealing orders of January 9, 2018 and November 1, 2018.

function, once Facebook released the newest version of Facebook Platform and cut off access to the Graph API to non-whitelisted developers for good. (5 CAA 1809, 1813.) As a result of Defendants' actions, Six4Three lost the more than $200,000 it had raised as seed capital, as well as the company's $4 million valuation, which was in place at the time Defendants cut off its access to the Graph API. (5 CAA 1812, 1824.)

The same evidence underlies Six4Three's cause of action for concealment, demonstrating that Defendants concealed and suppressed material facts concerning their plan to shut down access to the Graph API for all but a limited number of "whitelisted" companies, that Six4Three did not know the concealed facts and would not have acted as it did if it had known those facts; and that Six4Three was harmed. (*Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248.) In addition, Defendants owed Six4Three a duty to disclose material facts, because Six4Three had a business relationship with Defendants in which it provided Defendants with its confidential information. The parties were in a business relationship by virtue of the SRR—the contract Six4Three was required to enter into to access the Facebook Platform. (4 SCAA 2687; 3 SCAA 1293; 1481.) Under the SRR, Six4Three was obligated to provide its confidential and proprietary information to Facebook, which triggered Facebook's duty to be fair and candid in its disclosures of material facts to Six4Three. (4 SCAA 2687; *Heliotis v. Schuman* (1986), 181 Cal.App.3d 646, 651 [holding that a duty to disclose arises when the defendant is in a fiduciary relationship with the plaintiff].) The duty of the Individual Defendants derives from Facebook's duty, as the Individual Defendants devised and benefited from the scheme

described in the Complaint. Defendants owed a duty for the additional reason that, having chosen to encourage developers like Six4Three to build on Facebook Platform and provide partial, misleading information to Six4Three about Facebook's provision of its APIs, the Individual Defendants had a duty to provide complete, material information that would have affected Six4Three's decision to build its app on Facebook Platform. (*Rogers v. Warden* (1942) 20 Cal.2d 286, 289 [holding that one who elects to speak must make a "full and fair disclosure"]; *Warner Constr. Corp. v. L.A.* (1970) 2 Cal.3d 285, 294 [holding that a cause of action for concealment arises when: "(1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; or (3) the defendant actively conceals discovery from the plaintiff"].)

Six4Three's tortious-interference claims focus on an additional aspect of Defendants' fraud, that is, Defendants knowingly disrupted and/or terminated existing agreements and prospective economic relations between Six4Three and its customers. (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.) Six4Three submitted evidence to the trial court that it had existing purchase agreements with customers. Specifically, Six4Three's principal, Ted Kramer, testified that as of April 30, 2015, 4,481 users had downloaded the Pikinis app, with 3,963 users subscribing to paid, premium content. (5 CAA 1810.) Six4Three's projected profits from these user downloads and subscriptions was approximately $1.15 million. (*Ibid.*) Defendants knew of Six4Three's agreements with its

customers because the SRR required developers to form and maintain such agreements. [redacted] (3 SCAA 1484-1485.) [redacted] (3 SCAA 1340-1341, 1492.) As a result of Defendants' actions, Six4Three could not fulfill its existing agreements or provide its app to potential customers. (5 CAA 1809, 1813.) This harmed Six4Three. (5 CAA 1812, 1824.)

b) Six4Three Can Prevail on its Section 17200 Claim.

Six4Three's claim under California Business and Professions Code section 17200, *et seq.*, is based on the allegations and evidence described above, and the role of those allegations and evidence in the overall scheme that Defendants developed in order to lure developers to build apps on Facebook Platform, falsely promising to provide access to more than 50 APIs on an equal playing field with other developers and with Facebook itself. Far from maintaining an equal playing field, Defendants ousted the vast majority of competing apps, but "whitelisted" certain companies and apps for continued access, conditioning Facebook's provision of Graph API data on the purchase

of costly advertising or other financial consideration.[8] (4 SCAA 2235 [redacted], 2264 [redacted], 2306 [redacted], 2313 [redacted], 2161 [redacted], 2227 [redacted], 2154-2161 [redacted], 2355 [redacted]; 5 SCAA 4516; 3 SCAA 1778 [redacted].

The facts and evidence of this scheme support Six4Three's likelihood of prevailing on all three prongs of its section 17200 claim. First, under the "unfair" prong, the evidence proffered to the trial court supports Six4Three's allegation that Defendants sought to and did significantly threaten or harm competition. (Cal. Bus. & Prof. Code § 17200; *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 187.) Six4Three produced evidence showing that [redacted] (3 SCAA 1340-1341, 1492.) Six4Three also produced evidence showing that Defendants had entered into tying arrangements with certain companies, sufficient to support a claim under the Cartwright Act. (4 SCAA 2623-2661 [redacted]; Cal. Bus. & Prof. Code § 16727; *UAS Mgmt. Inc. v. Mater Misericordiae Hospital* (2008) 169 Cal.App.4th 357, 368–369.)

[8] In its Fifth Amended Complaint, Six4Three alleges additional facets of this scheme and explores more fully Defendants' motivations for the decisions that ultimately shut down Six4Three's app. (4 CAA 1192, 1264-1267.) For purposes of this appeal, Six4Three focuses on its most central allegations.

Second, under the "unlawful" prong, the evidence described above and provided by Six4Three to the trial court supports a number of predicate violations, including Defendants' violations of California's misrepresentation and concealment statutes (Cal. Civ. Code § 1719, *et seq.*), Six4Three's common law tort and fraud claims, and Defendants' violation of a July 27, 2012 Federal Trade Commission order, which serves as an independent predicate violation, cognizable under section 17200. (Cal. Bus. & Prof. Code § 17200; *Cel-Tech, supra,* at p. 180 [section 17200 "borrows violations of other laws and treats them as unlawful practices."]; 5 CAA 2296.)

Third, the evidence Six4Three has produced to support its fraud and tort causes of action also supports a claim under the "fraudulent" prong of section 17200. (Cal. Bus. & Prof. Code § 17200.) Six4Three's burden here is low, as Six4Three need only show that the public is likely to be deceived by Defendants' actions. (*In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 312.) Six4Three provided evidence showing that [redacted] (3 SCAA 1296-1297.) Six4Three seeks the injunctive relief available under Section 17200, as Facebook continues to represent to this day that [redacted] (3 SCAA 1483.)

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's decision, and remand with instructions to enter an order denying the Individual Defendants' Anti-SLAPP Motion.

CERTIFICATION OF WORD COUNT

In compliance with California Rules of Court, Rule 8.204(c)(1), I hereby certify that Cross-Appellant Six4Three's Opening Brief contains 11,797 words, including footnotes, as calculated by the word processing software used to prepare the brief.

Dated: March 13, 2019

/s/ Scotia J. Hicks

Scotia J. Hicks
Allison E. Ehlert

EHLERT HICKS LLP

Attorneys for Respondent and Cross-Appellant Six4Three, LLC